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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EMILIO CASTRO,

Defendant and Appellant.

A124961

(City & County of San Francisco
Super. Ct. No. 205408)

Emilio Castro appeals following his conviction upon a jury verdict of one count of selling cocaine base. (Health & Saf. Code, § 11352, subd. (a).) Counsel has briefed no issues and asks for our review of the record of the proceedings. (*People v. Wende* (1979) 25 Cal.3d 436.) He also has asked for our review of discovery records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Castro has not filed a supplemental brief. We have reviewed the entire record and affirm.

DISCUSSION

A plainclothes San Francisco police officer engaged in a “buy-bust operation” approached Castro on a street corner in the Tenderloin and asked him for “a 20,” meaning \$20 worth of cocaine base. Castro spit several off-white-colored rocks wrapped in clear plastic into his own hand, and told the officer to pick one.¹ The officer chose a rock and

¹ Drug dealers often wrap the drugs in plastic so they can carry them concealed inside their mouths, and can swallow them if necessary to avoid detection by law enforcement officers.

gave Castro a marked \$20 bill. The officer then walked away and gave a signal to another officer to arrest Castro.

As the arrest team approached, Castro turned away and the “close-cover” officer who was observing the operation was not able to see Castro’s hands. The officer who purchased the suspected narcotics positively identified Castro, and Castro was arrested. Police found the marked \$20 bill in Castro’s pocket, but recovered no additional suspected narcotics. The substance that the officer purchased from Castro tested positive for cocaine base.

Castro was charged with a single count of transportation, sale or giving away of cocaine base under Health and Safety Code section 11352, subdivision (a). The information also alleged that he had two prior convictions for transportation, sale, or giving away a controlled substance, as well as one prior conviction for possession of a controlled substance for sale, thus making him ineligible for probation and subject to a consecutive three-year enhancement for each prior conviction. The information also alleged that two of the prior convictions led to prior prison terms within the meaning of Penal Code section 667.5.

Castro filed a motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, seeking information regarding the officer who bought the cocaine from him, including any information concerning allegations that the officer was dishonest or had fabricated evidence. The parties stipulated that the police department would produce personnel records for the trial court’s in camera review, and any relevant information would be disclosed to the defense under protective order. Castro also sought supervised pretrial release, and his motion was denied. Castro made four motions under *People v. Marsden* (1970) 2 Cal.3d 118 to discharge his attorney and each was denied.

At trial Castro testified that he was addicted to cocaine base for 15 years and smoked it with friends throughout the night before his arrest. When they ran out, Castro tried to buy more, but he later discovered he was sold fake cocaine base when he smoked

it and it had no effect. Castro went to the street corner to sell the fake cocaine, so that he could use proceeds from the sale to buy real cocaine base. When he was approached by the plainclothes officer, Castro testified that he had only one rock with him. He acknowledged the rock may have contained some particles of cocaine, but claimed that he and his friends felt no effects from it, and it “wasn’t good enough for [his] addiction.”

The jury found Castro guilty of the sole count charged. Castro waived his right to a jury trial on the prior conviction allegations, and the court generally found them true, except for two of the allegations under Penal Code section 1203.07 that were found not true. The People recommended a sentence of ten years in state prison, while defense counsel requested a three-year prison term. The court sentenced Castro to the upper term of five years in state prison for transporting, selling or giving away cocaine base, and struck the punishment for all the enhancements based on the prior convictions. The court also imposed various fines and fees, and awarded Castro 529 days of custody credits. Castro timely appealed.

Castro was represented by counsel at all stages of the proceedings, and received a fair trial. Substantial evidence supported his jury conviction for selling cocaine base, and the allegations of prior convictions that the court found true. There was no error in the sentence imposed. Appellate counsel has advised Castro of his right to file a supplemental brief in this court within 30 days of counsel’s opening brief, but no supplemental brief has been filed. Our review of the record reveals no issue that requires further briefing.

Castro’s motion for review of the *Pitchess* materials sought by his trial counsel asks this court “to determine whether the trial court abused its discretion by failing to order disclosure of relevant materials.” Our review of the sealed record of the in camera proceeding discloses no such abuse of discretion. The trial court found that only one item it reviewed was relevant and therefore subject to disclosure. (See Evid. Code, § 1043 et seq.; *People v. Mooc* (2001) 26 Cal.4th 1216; *Pitchess*, *supra*, 11 Cal.3d 531.) To the

extent that appellate counsel suggests no documents were provided to the defense following the trial court's in-camera review, that allegation is not supported by the record.² The record includes defense counsel's acknowledgement during proceedings before the trial court that he did receive discovery as a result of the *Pitchess* motion. Nothing in the record demonstrates any failure to comply with the procedure stipulated by the parties.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuiness, P.J.

Pollak, J.

² Appellate counsel's declaration stating that "[n]o documents were sent to appellant" when this court received the documents under seal from the trial court does not constitute competent evidence that no *Pitchess* discovery was received by Castro's trial counsel following the trial court's in camera review.